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No. 87-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CATALINO LASTIMOSA,
Petitioner,

vs.

HUGHES AIRCRAFT COMPANY
AND JACK CURTIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below err in affirming the district court's judgment for respondents on the ground that petitioner's wrongful discharge claim under state law was essentially a claim that he was discharged in violation of a collective bargaining agreement, and thus was preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, where petitioner claimed he was discharged in violation of safety provisions contained in a collective bargaining agreement?

2. Did the court below err in holding that the district court need not imply an amendment of petitioner's complaint to allege an essential element of a claim under federal law, where petitioner represented to the district court that he made no such allegation and did not seek leave to amend in the district court?

RULE 28.1 LISTING

Parties to the proceedings below were: plaintiff-appellant Catalino Lastimosa and defendants-appellees Hughes Aircraft Company ("HAC") and John Curtis. The parent company of HAC is GM Hughes Electronics Corporation, a wholly-owned subsidiary of General Motors Corporation. HAC's subsidiaries (except wholly-owned subsidiaries) and affiliates presently include ACCSO S. A.; Alliance Development Corporation; Atlantic Satellites Ltd.; ELEKLUFT Elektronik-und Luftfahrtgerate GmbH; ELTRO GmbH; HBH Services Corporation; Japan Communications Satellite Company, Inc.; Japan Satellite Communications Network Corporation L-T Ranches, Inc.; Nippon Avionics Co., Ltd.; and UKADGE Systems Limited. HAC also has an interest in the following joint venture partnerships: AMRAAM International Licensing Company; Earth Observation Satellite Company; HBH Company, a Joint Venture of Hughes Aircraft Company, The Bendix Corporation and Holmes & Narver, Inc.; HKV, a Joint Venture of International Electronics Systems, Inc. and A/S Kongsberg Vaapenfrabrikk; Hughes Information Systems, a Partnership of International Electronics Systems, Inc. and Hughes Systems Management International; MET, a Joint Venture of Hughes Aircraft Company and Texas Instruments Incorporated; Project 436 Joint Ventures (two classified joint ventures); T.A.D. Communications Company, a Joint Venture of Hughes Aircraft Company and the International Telephone and Telegraph Corporation; T.A.D. Communications Company International, a Joint Venture of International Electronics Systems, Inc.; AVCRON; and Western Alliance Air Defense.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 28.1 LISTING ii

TABLE OF AUTHORITIES vi

OPINION AND JUDGMENT BELOW 1

STATUTES AND RULES INVOLVED 2

I. STATEMENT OF THE CASE 2

A. FACTUAL BACKGROUND 3

B. PROCEDURAL BACKGROUND 6

II. REASONS REVIEW SHOULD BE DENIED 11

A. LASTIMOSA'S CLAIM UNDER STATE LAW IS PREEMPTED BY SECTION 301 BECAUSE IT IS ESSENTIALLY A CLAIM FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT 11

1. The Ninth Circuit's Decision in This Action Does Not Conflict With The Decisions of This Court. 11

Page

a. The Decision Does Not Conflict With *Caterpillar* 11

b. The Decision in This Action is Consistent With *Allis-Chalmers* 14

c. State Law Supports the Decision in This Action 16

d. The Other Authorities Cited by Lastimosa Are Inapposite 18

2. The Ninth Circuit's Decision in This Action Does Not Conflict With Other Decisions of the Circuit 20

B. THE COURT OF APPEALS DID NOT ERR IN REFUSING TO IMPLY AN AMENDMENT OF LASTIMOSA'S COMPLAINT 24

III. CONCLUSION 26

INDEX TO APPENDIX

Page

APPENDIX A

29 U.S.C. § 185
Section 301, Labor Management Relations Act A-1

29 U.S.C. § 157
Section 7, National Labor Relations Act. A-1

29 U.S.C. § 158
Section 8, National Labor Relations Act A-2

Federal Rule of Civil Procedure 15 ..... A-2

APPENDIX B

Excerpts from Deposition of Catalino Lastimosa. B-1

TABLE OF AUTHORITIES

Page

Cases

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 14, 15, 18

Bale v. General Telephone Co. of Calif.,
795 F.2d 775 (9th Cir. 1985) 23

Buscemi v. McDonnell Douglas Corp.,
736 F.2d 1348 (9th Cir. 1984) 8

Caterpillar, Inc. v. Williams,
482 U.S. ___, 107 S.Ct. 2425 (1987) 11-14

Davis v. United States,
417 U.S. 333 (1974) 20

De Soto v. Yellow Freight Systems, Inc.,
811 F.2d 1333 (9th Cir. 1987) 22-24

Friday v. Hughes Aircraft Co.,
188 Cal.App.3d 117,
225 Cal. Rptr. 89 (1986) 17, 22

Garibaldi v. Lucky Food Stores, Inc.,
726 F.2d 1367 (9th Cir. 1984), *cert. den.*,
471 U.S. 1099 (1985) 21-23

Internat'l Brotherhood of Electrical Workers v. Hechler,
107 S.Ct. 2161 (1987) 15

Page

Jim Causley Pontiac v. NLRB,
620 F.2d 122 (6th Cir. 1980) 8

Lingle v. Norge Div. of Magic Chef, Inc.,
823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226 (1987) 19

NLRB v. City Disposal Systems, Inc.,
465 U.S. 822 (1984) 8

Oglesby v. RCA Corp.,
752 F.2d 272 (7th Cir. 1985) 22

Olguin v. Inspiration Consolidated Copper Co.,
740 F.2d 1468 (9th Cir. 1984) 19, 22, 23

Paige v. Henry J. Kaiser Co.,
826 F.2d 857 (9th Cir. 1987) 11, 20-22, 24

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 8, 18

Schroeder v. Trans World Airlines,
702 F.2d 189 (9th Cir. 1983) 23

United Air Lines, Inc. v. Occupational Safety and Health Appeals Board,
32 Cal.3d 762, 187 Cal. Rptr. 387,
654 P.2d 157 (1982) 18, 19

Vaca v. Sipes,
386 U.S. 171 (1967) 18, 25

Page

Young v. Anthony's Fish Grottos, Inc.,
830 F.2d 993 (9th Cir. 1987) 22

Statutes

Federal

29 U.S.C. § 185(a), Section 301 of the
Labor Management Relations Act..... *passim*

29 U.S.C. § 157, Section 7 of the
National Labor Relations Act 2, 8

29 U.S.C. § 158(a)(1), Section 8 of the
National Labor Relations Act 2, 8

State

California Labor Code
§§ 6300, *et seq.* 2
§ 6400 16
§ 6310 16

Rules

Federal Rule of Civil Procedure 15(a) 2, 25

United States Supreme Court Rule 17 26

No. 87-1263

IN THE

Supreme Court of the United States

October Term, 1987

CATALINO LASTIMOSA,
Petitioner,
vs.

HUGHES AIRCRAFT COMPANY
AND JACK CURTIS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Hughes Aircraft Company ("HAC") and Jack Curtis (collectively the "respondents") respectfully request that this Court deny the petition of Catalino Lastimosa ("Lastimosa") for a writ of certiorari, seeking review of the decision and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on October 30, 1987.

OPINION AND JUDGMENT BELOW

The original opinion (an unpublished memorandum decision) and judgment of the Court of Appeals, the order amending such opinion and denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (the "Petition for Rehearing"), and the findings of fact and conclusions of law of the United States District Court for

the Central District of California are reproduced in the Appendix to Lastimosa's Petition for Writ of Certiorari (the "Petition"), and are therefore not reproduced herein.

STATUTES AND RULES INVOLVED

Pertinent portions of the California Occupational Health and Safety Act, California Labor Code §§ 6300, *et seq.* are reproduced in the Appendix to the Petition and are therefore not reproduced herein. The pertinent portions of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158, and Rule 15 (a) of the Federal Rules of Civil Procedure are set forth in Appendix A hereto.

I

STATEMENT OF THE CASE[1]

As the question before this Court is whether this action raises any issues which merit the Court's review, respondents will not attempt to state here all of the facts relevant to this action. However, the following factual statement is necessary to consider the issue now before the Court.

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[1] The facts set forth herein are supported by documentary evidence, deposition testimony, and declarations presented to the district court in connection with respondents' motion for summary judgment in this action. Lastimosa presented no evidence in the district court which contradicted that presented by respondents.

A. FACTUAL BACKGROUND

Lastimosa was employed by HAC from June 1978 until June 1984. At all relevant-times, HAC was engaged in the business of, among other things, manufacturing delicate electronic circuits used in products such as travelling wave tubes. At the time of his discharge, Lastimosa worked as a furnace operator in what is known in the electronics industry as a Class 100,000 clean room. The air in a Class 100,000 clean room is specially filtered to be roughly 10 times cleaner than the outside air. HAC maintained the furnace room in this manner because the furnaces were used to braze electronic circuits, which are particularly susceptible to contamination from dust and other particulates. In addition to filtering the air, HAC required furnace room employees to wear special clothing and prohibited smoking in the room. Access to the room was gained through an air lock, and daily "wet downs" and cleanings of the furnace room were also performed. One wall of the furnace room included several large glass windows, and HAC customers occasionally passed by these windows on tours of the facility or on business visits. HAC marketed its products in part by indicating the clean conditions under which these delicate electronic circuits were processed, including the clean room status of its furnace room operation.

Lastimosa claims in his Petition that the external surfaces of the furnaces were "wrapped in asbestos." The evidence before the courts below showed that actually, some of the surfaces of five of eleven furnaces in the furnace room were wrapped in a "sleeve" composed of transite, which is a hard, cement-like compound, partially composed of asbestos. The transite served as a heat shield. Furnace operators did not come in contact with the transite while operating the furnaces, no moving parts were made of this

asbestos material, and the transite was never used as a working surface. Lastimosa also asserts that in June 1984, HAC "began replacing the asbestos on the furnace with new asbestos, thereby increasing the risk of asbestos exposure." This statement presumably refers to the fact that at one time, certain furnaces used asbestos gaskets, which were replaced on occasion. HAC presented undisputed evidence that the use of asbestos gaskets in the furnaces was discontinued at least 18 months prior to Lastimosa's termination, and that in any event, the furnaces were always removed from the furnace room when the gaskets were replaced.

Throughout his employment at HAC, Lastimosa was a member of a labor organization, the Electronic and Space Technicians, Local 1553 of the AFL-CIO (the "Union"), which was the exclusive collective bargaining representative of Lastimosa and certain other HAC employees. At all times relevant to the issues herein, there was a written collective bargaining agreement in effect between HAC and the Union (the "CBA"), which governed Lastimosa's wages, hours and working conditions.

Article XXI of the CBA dealt with safety in the workplace. HAC agreed in this Article to conduct safety inspections, provide safety devices, and take other specific steps to maintain "high standards of safety." One of HAC's specific obligations under this Article was:

> [T]o provide modern and appropriate safety devices and protective equipment to safeguard and protect its employees; and, the use of such safety devices and protective equipment, when furnished, shall be mandatory.

Article XXI also stated that:

> An employee, or the employee's Department Steward who believes that a job assignment is

> unsafe, shall report such conditions to the immediate Supervisor who will institute an investigation immediately.

Article II of the CBA provided that employees could be discharged "for cause," and that HAC had the right to establish work procedures and methods. The CBA also provided a final and binding grievance and arbitration procedure for settling disputes between an employee and HAC, including disputes over an employee's rights under the CBA. Lastimosa had received a copy of the CBA and had utilized its grievance procedure on many occasions.

In 1984, Lastimosa complained to HAC about what he thought was a safety hazard in his workplace: he claimed that there were asbestos particles in the furnace room air. At Lastimosa's request, HAC provided him with protective paper dust masks to wear pending an investigation of his complaint. Lastimosa also made an anonymous complaint to the State of California's Occupational Safety and Health Administration ("Cal-OSHA"), which conducted a surprise inspection of HAC's facility for the purpose of determining whether there was any asbestos exposure danger. The inspection conducted by Cal-OSHA resulted in no citation or violations to HAC, and showed no safety hazard or asbestos detected in Lastimosa's workplace. In fact, Cal-OSHA determined that levels of asbestos in the furnace room were lower than what Lastimosa encountered in the air outside the building, and so advised Lastimosa.

The results of the 1984 Cal-OSHA inspection were consistent with a prior inspection by the same agency, and earlier testing conducted by HAC. In 1983, Cal-OSHA had made a surprise inspection of the same furnace room in response to an anonymous complaint, and had found no violation of safety regulations. Moreover, HAC conducted air sampling tests in the furnace room in 1980 and 1982. A certified, independent laboratory reported to HAC on both

occasions that no asbestos within detectable limits was found in the air samples collected.

Following Cal-OSHA's 1984 inspection, Lastimosa was advised about the results of the inspection and told that he would no longer be permitted to wear a dust mask. HAC took the position that there was no asbestos hazard, as borne out by the inspections and testings; that Lastimosa had not presented any medical documentation to indicate he was suffering from asbestos exposure or that he was unable to work in the furnace room; and that continued wearing of a dust mask was detrimental to HAC's ability to ensure the integrity of its clean room to customers. Lastimosa then filed a written grievance under the CBA, stating that he should be allowed to wear a dust mask. In its response, HAC stood by its position that Lastimosa would not be allowed to wear a dust mask.

Subsequently, Lastimosa began wearing a dust mask again. When Lastimosa refused to remove the mask after being reminded of the Cal-OSHA test results, he was suspended pending further notice. He then received a telegram from HAC in which he was given one last chance to report to work without a dust mask, or submit medical documentation of the need to wear one; he was also advised that if he failed to do so he would be discharged. Lastimosa then met with supervision and Union representatives. At this meeting, Lastimosa maintained that he would not work without a dust mask and did not submit any medical documentation. HAC therefore discharged Lastimosa at the conclusion of the meeting.

B. PROCEDURAL BACKGROUND

Lastimosa challenged his discharge through the CBA's grievance process and by filing unfair labor practice charges against HAC and the Union with the National Labor

Relations Board ("NLRB"). In both forums, he claimed that he was discharged for wearing the dust mask, and that his discharge violated Article XXI of the CBA, which stated that the use of safety devices, when provided by HAC, was "mandatory." The Union's Executive Committee reviewed his grievance and concluded that it lacked sufficient merit to place it into formal arbitration. The NLRB dismissed Lastimosa's charges and denied his subsequent appeal for lack of sufficient evidence to establish that he was discharged for any reason other than failure to comply with instructions.

Lastimosa then filed this action in the California Superior Court for the County of Los Angeles, alleging a single cause of action for "wrongful discharge." The Complaint referred to "company rules" which Lastimosa claimed were violated by HAC and which, he alleged, entitled him to use the dust masks; Lastimosa testified in his deposition that the "rules" referred to Article XXI of the CBA. Lastimosa further testified that he was discharged in violation of the CBA for wearing a safety mask whose use was, according to his interpretation of Article XXI, mandatory. Lastimosa disclaimed in his deposition the argument that he was discharged in retaliation for filing a complaint with Cal-OSHA and indeed, his complaint to the agency was made anonymously. The following quotes dramatically illustrate the inconsistency between Lastimosa's argument and the undisputed facts (emphasis has been added). Additional deposition excerpts showing the nature of Lastimosa's claim are set forth in Appendix B hereto.

Q. . . . Have you told me all the information you have upon which you're basing your claim that you were fired from Hughes for reporting them to Cal-OSHA about asbestos?

A. *I never claimed I was fired for reporting it to Cal-OSHA. I — I was fired for wearing a safety mask.*

* * *

Q. Did you call [the Carpenters' Union] to complain about asbestos at Hughes?

A. *No. I called to complain that I was terminated for wearing a safety mask because of the asbestos exposure.*

HAC removed the Complaint to federal district court on the ground that Lastimosa's alleged state law claim was preempted by federal labor law. HAC then moved for summary judgment on the grounds that federal labor law preempted Lastimosa's alleged state law claim, or alternatively, because Lastimosa's claim was preempted by the National Labor Relations Act (the "NLRA") and within the exclusive jurisdiction of the NLRB. 29 U.S.C. §§ 157, 158(a)(1).[2]

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[2] This second ground, based on the NLRA, was not addressed by either the district court or the Ninth Circuit in their decisions, and Lastimosa has not raised the issue in his Petition. Respondents contend that NLRA preemption provides a separate, independent ground for the decision of the Ninth Circuit. Lastimosa's allegations amount to protected activity under Section 7 of the NLRA, because he was invoking a right arising under the CBA. Further, Lastimosa alleged in his NLRB proceedings that HAC and his Union committed unfair labor practices under Section 8 of the NLRA. Controversies under Sections 7 and 8 are subject to the exclusive jurisdiction of the NLRB, and state claims based on the same activity are preempted. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)(states must defer to the exclusive competence of the NLRB); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984)(employee acting alone may engage in protected activity). *See also Jim Causley Pontiac v. NLRB*, 620 F.2d 122 (6th Cir. 1980) (employee claiming layoff in retaliation for filing safety complaints with Michigan Occupational Safety and Health Administration held to be engaged in protected activity under Section 7); *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348 (9th Cir. 1984) (employee's wrongful discharge claim properly removed and dismissed based on NLRA preemption where plaintiff claimed retaliation for voicing complaints about employer practices).

The district court granted summary judgment to respondents, holding that "[d]eposition testimony makes clear that plaintiff's claim in reality is essentially that he was discharged in violation of the provisions of the CBA pertaining to safety and discharge." (Petition, Appendix A at A-13.) Thus, Lastimosa's claim was preempted by Section 301 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. § 185. The court further held that even if Lastimosa's state law claim was recharacterized as a claim for breach of the CBA under Section 301, it failed as a matter of law because the grievance and arbitration procedures set forth in the CBA were final and binding on Lastimosa, absent any allegation that the Union had breached its duty of fair representation in processing Lastimosa's grievance. (Petition, Appendix A at A-19 to A-20.)

Lastimosa appealed the district court's decision to the Ninth Circuit Court of Appeals. Lastimosa continued to argue that his claim for wrongful discharge was not preempted, and, for the first time, argued that if his state claim was preempted the district court had improperly denied him the opportunity to amend his Complaint to plead that the Union had breached its duty of fair representation.

The Ninth Circuit affirmed the decision of the district court in a memorandum decision, concluding that the action had been properly removed and subsequently dismissed by the trial court. The Ninth Circuit held that the district court properly applied the artful pleading doctrine to determine that Lastimosa was asserting a claim grounded in the safety provisions of the CBA, even though his claim was framed as a state law tort and contract action. The

Ninth Circuit concluded that Lastimosa's rights in his state wrongful discharge action would "substantially depend on analysis of the terms" of the CBA. (Petition, Appendix A at A-3 to A-4.)

The Ninth Circuit further reasoned that the state statutes relied upon by Lastimosa were directed not at the general public, but at employers and the employment relationship, and that the CBA provided no less protection to Lastimosa than did these state statutes. The Ninth Circuit finally concluded that federal labor policies favoring uniform interpretation of collective bargaining agreements and exclusivity of union-employer procedures mandated that Lastimosa not be allowed to pursue his state law claim. (Petition, Appendix A at A-4 to A-6.)

As to Lastimosa's proposed amendment to the Complaint, the Ninth Circuit held that the district court did not err by failing to imply an amendment to include an allegation of breach of the duty of fair representation, because Lastimosa had asserted in the district court that he was alleging no such breach. Furthermore, the Ninth Circuit concluded that Lastimosa had not raised the issue in the district court, and had not requested leave to amend his Complaint from such court at any time. (Petition, Appendix A at A-7.) Thereafter, Lastimosa filed his Petition for Rehearing with the Ninth Circuit, which was denied. (Petition, Appendix A at A-9.)

II

REASONS REVIEW SHOULD BE DENIED

A. LASTIMOSA'S CLAIM UNDER STATE LAW IS PREEMPTED BY SECTION 301 BECAUSE IT IS ESSENTIALLY A CLAIM FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

Lastimosa argues that certiorari should be granted in this action because the Ninth Circuit "refused to consider" the decision by this Court in *Caterpillar, Inc. v. Williams*, 482 U.S. ___, 107 S.Ct. 2425 (1987), another Ninth Circuit decision, *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), and "other generally applicable principles of Federal Pre-emption." (Petition at i.) The Ninth Circuit not only considered, but properly applied, principles set out in this Court's decisions on Section 301 preemption, including this Court's decision in *Caterpillar*. Furthermore, the decision in this action is consistent with *Paige* and other Ninth Circuit decisions. Therefore, Lastimosa's Petition does not present any question suitable for this Court's review.

1. The Ninth Circuit's Decision in This Action Does Not Conflict With The Decisions of This Court

a. The Decision Does Not Conflict With *Caterpillar*

Lastimosa claims that the Ninth Circuit "refused to consider" *Caterpillar*. However, the Ninth Circuit's

decision in *Caterpillar* was fully discussed in the appellate briefs of the parties to this action (before this Court affirmed), and the Ninth Circuit cited this Court's decision in *Caterpillar* in its decision in this action. Clearly the Ninth Circuit *did* consider the principles set forth in *Caterpillar*, and did not act in conflict with such principles.

In *Caterpillar*, the plaintiffs claimed that while they were management employees, Caterpillar made certain promises to them concerning the length of their employment. The plaintiffs were later downgraded to hourly positions covered by a collective bargaining agreement, and then laid off from those positions. The plaintiffs filed an action in California state court claiming breach of the individual employment contracts. Caterpillar's removal of the action to federal court on the ground that any individual employment contracts were merged into and superseded by the collective bargaining agreement was upheld by the trial court. The Ninth Circuit reversed, holding that the plaintiffs' state-law claims were neither directly nor indirectly grounded upon rights created by the collective bargaining agreement, did not require interpretation or application of that agreement, and therefore did not arise under Section 301. This Court affirmed.

Generally, when federal preemption is raised as a defense to allegations in a pleading, removal is not justified. However, in *Caterpillar*, this Court recognized that claims brought by a plaintiff under state law may in reality be Section 301 claims which are completely preempted by federal law. Under the "complete preemption" doctrine, such claims may only be considered as federal claims arising under federal law, and are properly removable. 107 S.Ct. at 2430. That is, Section 301 governs claims founded on rights created by collective bargaining agreements, as well as claims "substantially dependent on analysis of a

collective bargaining agreement." *Id.* at 2431. As to such claims, Section 301 has complete preemptive effect.

> [W]hen "[t]he heart of the [state law] complaint [is] a . . . clause in the collective bargaining agreement," . . . that complaint arises under federal law:
>
> > "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301."

Id. at 2430 (citations omitted).[3] Applying these principles to the facts in *Caterpillar*, this Court concluded that the plaintiffs' claims were not "completely preempted" Section 301 claims, because the plaintiffs were claiming rights under individual employment contracts, and not a collective bargaining agreement. *Id.* at 2431.

The facts of the present action are quite different. Lastimosa was, throughout his employment at HAC, a bargaining unit employee, and does not rely on any separate, individual contract as the source of his state law claim. Moreover, Lastimosa's wrongful discharge claim is firmly based on HAC's alleged breach of the CBA, and is entirely dependent upon analysis of the safety and discharge provisions thereof. Lastimosa consistently

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[3] Lastimosa contends that under *Caterpillar* he is "master of his complaint," and may choose whether to bring his claim under state or federal law. However, this Court in *Caterpillar* recognized that such a choice exists *only* when preemption is raised as a defense to a state law claim which is not completely preempted. Lastimosa has invoked a right created by the CBA and asserted a claim which arises under federal law. He therefore cannot "choose" to bring a state law claim instead.

maintained, on the job, in his deposition testimony, and in his Union grievance and NLRB charges that he was asserting a right under Article XXI of the CBA to wear the dust mask and that he was discharged in violation of Articles XXI and II (the safety and discharge provisions) of the CBA. Although Lastimosa now attempts to argue that he is relying upon independent state rights, his own testimony and conduct show otherwise.

Finally, Lastimosa focuses on this Court's statement in *Caterpillar* that not every dispute concerning employment or "tangentially involving" the provisions of a collective bargaining agreement is preempted by Section 301. (Petition at 16.) This argument is without merit. Lastimosa's claim more than tangentially involves the CBA. It concerns matters of workplace safety, matters over which HAC and the Union specifically bargained during the collective bargaining process, and over which the parties reached agreement as set forth in the CBA. Moreover, the CBA's safety and discharge provisions can reasonably be read to prohibit retaliatory discharges of employees who make safety complaints. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, ___ , 105 S.Ct. 1904, 1913 (1985) ("The assumption that the labor contract creates no implied rights is not one that state law may make . . . . There is no reason to assume that the labor contract as interpreted by the arbitrator would not provide such relief.").

b. The Decision in This Action is Consistent With *Allis-Chalmers*

Lastimosa further argues that the rights against retaliatory discharge afforded him under Cal-OSHA are rights afforded every California employee which exist independent of the CBA, and thus his state action asserting such rights is not preempted. He also argues that his state

claim is an action in tort and thus separate from the CBA. (Petition at 17.) Both arguments fail under this Court's decision in *Allis-Chalmers Corp.*, 105 S.Ct. at 1904, a decision which Lastimosa fails to mention in his Petition. In *Allis-Chalmers*, a union employee brought a state law tort action against his employer for bad faith handling of an insurance claim. The claim had been made pursuant to an insurance plan contained in the collective bargaining agreement between the plaintiff's union and the employer. The Court held that federal labor law preempts not only state contract claims, but also state tort claims which "as applied, would frustrate the federal labor-contract scheme established in § 301." 105 S.Ct. at 1910. This Court held that the plaintiff's tort claim was preempted by federal labor law because the claim was "inextricably intertwined with consideration of the terms of the labor contract." 105 S.Ct. at 1912. *See also, Internat'l Brotherhood of Electrical Workers v. Hechler*, 107 S.Ct. 2161 (1987) (state law tort claim based on allegation that union failed to provide safe workplace preempted by Section 301 because claim not sufficiently independent of the collective bargaining agreement).

The Court emphasized in *Allis-Chalmers* that preemption was necessary to preserve "the central role of arbitration" in the collective bargaining system, expressing concern that plaintiffs could simply bypass arbitration by "re-labeling" a claim arising out of a labor contract as a tort claim. 105 S.Ct. at 1915.

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

105 S.Ct. at 1916 (citation omitted).

In the present action, Lastimosa's state claim is inextricably intertwined with consideration of the terms of the CBA because it is derived from the CBA itself. The fact that Lastimosa has chosen to label his claim a tort claim, and has gone to considerable length to find some state statute which purportedly protects him, cannot alter this state of affairs.

c. State Law Supports the Decision in This Action

Lastimosa invokes state policies set forth in the California Labor Code. Section 6400 of that Code provides that "[e]very employer shall furnish employment and a place of employment which are safe and healthful for the employees therein." Labor Code § 6310 prohibits, *inter alia*, the discharge of an employee because such employee has made safety complaints. However, the language of Labor Code Section 6310 evinces a specific intent on the part of the state legislature *not* to prevent the operation of collective bargaining processes in connection with retaliation claims under the Labor Code. Section 6310 provides in pertinent part as follows:

> (b) . . . Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee *who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration,* or hearing authorized by law, is guilty of a misdemeanor.

(Emphasis added.) Thus, the state specifically envisioned that in the case of union employees, enforcement of the policy set forth in Section 6310 would come through the grievance and arbitration procedures contained in collective bargaining agreements. To hold that Lastimosa can invoke

those procedures and then ignore their binding effect by subsequently pursuing a state law wrongful discharge action would not only undermine a method of enforcement specifically recognized by the state statute in question, but would pose a significant threat to the collective bargaining process.

Moreover, the California Court of Appeals has held that where a collective bargaining agreement deals specifically with safety issues, state wrongful discharge claims based on state safety statutes are preempted. *Friday v. Hughes Aircraft Co.*, 188 Cal.App.3d 117, 225 Cal. Rptr. 89 (1986) (appeal to California Supreme Court dismissed and this opinion ordered published by Supreme Court). In *Friday*, an employee brought a state claim for wrongful termination, claiming that he was terminated for reporting violations of the hazardous waste provisions of the California Health and Safety Code to his employer. The plaintiff's employment was governed by a CBA which contained express safety provisions substantially similar to those in the present action, since the plaintiff was also employed by HAC and represented by the same union as Lastimosa. The California Court of Appeals held that plaintiff's state action was preempted by Section 301 despite the state's interest expressed in its Health and Safety statutes.

> We find the facts reported in Friday's declaration imply nothing more than complaints about the safety of his workplace, a subject expressly covered by article XXI of the collective bargaining agreement.
>
> . . .
>
> . . . allowing Friday's wrongful termination action to go forward would involve consideration of the terms of the labor contract and directly interfere

with federal regulation of disputes arising out of collective bargaining agreements.

188 Cal.App.3d at 124.

d. The Other Authorities Cited by Lastimosa Are Inapposite

Lastimosa vaguely refers in his Petition to "well established federal law concerning preemption" which the Ninth Circuit failed to consider in this action, but does not detail how the decision in the present action conflicts with such federal law. The two cases he cites in support of this argument — *Vaca v. Sipes*, 386 U.S. 171 (1967), and *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board*, 32 Cal.3d 762, 187 Cal. Rptr. 387, 654 P.2d 157 (1982) — do not support his Petition.

Lastimosa misstates the holding in *Vaca*. This Court stated in *Vaca* that "this preemption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the *NLRB*," *not* the federal courts as stated by Lastimosa. 386 U.S. at 179 (emphasis added). The preemption doctrine referred to was not Section 301 preemption, but preemption based on the exclusive jurisdiction of the NLRB under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). These two doctrines involve different considerations and tests; "*Garmon* and like cases have no application to § 301 suits." 386 U.S. at 184. *See also Allis-Chalmers*, 105 S.Ct. at 1913 n.9 (the balancing test applied in *Garmon* preemption cases is "irrelevant" to suits under Section 301, in which Congress has mandated that federal law should govern).

The California Supreme Court decision in *United Airlines* involved a jurisdictional conflict between Cal-OSHA and the Federal Aviation Administration (the

"FAA") over regulation of employee safety at an airport ground maintenance facility. The California Supreme Court rejected an argument by United that Cal-OSHA could not regulate airport employee safety because of jurisdictional limits set forth in the Federal Occupational Safety and Health Act ("Fed-OSHA"), reasoning that Fed-OSHA specifically provides an exception to federal preemption where a state has enacted a federally approved plan. The decision in *United Airlines* does not address the question of federal labor law preemption, nor does it address the question of federal preemption where the relevant federal statute (in the present case, Section 301) does *not* specifically provide for limited state regulation.[4]

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[4] As a final note, respondents wish to refer to a Seventh Circuit case, not addressed in the Petition, in which certiorari has been granted by this Court. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226 (1987), the Seventh Circuit held that state law retaliatory discharge claims are preempted where the plaintiff is subject to a collective bargaining agreement which regulates discharge. The court reasoned, as the Ninth Circuit did in *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), and other decisions, that these state claims require interpretation of the collective bargaining agreements' discharge provisions, that such agreements provide protection equal to that of state statutes and policies prohibiting retaliatory discharge, and that the interests of federal labor policy require that such state claims be preempted. In the present action, the undisputed facts available to the courts below are much more compelling than in *Lingle*, and make clear that Lastimosa's claim is *not* a claim that he was discharged in retaliation for exercising rights under a state statute. Instead, Lastimosa claims that he was discharged for asserting a right under the CBA, a claim completely preempted by Section 301.

2. The Ninth Circuit's Decision in This Action Does Not Conflict With Other Decisions of the Circuit

Lastimosa also seeks review by this Court based on the assertion that the Ninth Circuit's decision in this action conflicts with the decision of another Ninth Circuit panel in *Paige*. Although conflict *between* the federal courts of appeal is a consideration governing this Court's review (*see* Rule 17 of this Court), ordinarily an intracircuit conflict is not a sufficient basis for granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (petition for certiorari denied in earlier proceeding where party claimed intra-circuit conflict). There is no reason in the present action to depart from that usual practice. A party's remedy for such conflict is to seek hearing en banc by the court of appeals, which court will presumably resolve any perceived inconsistencies. Lastimosa filed such a petition, and the Ninth Circuit in its responsive order declared that "no judge of [the Ninth Circuit] has requested a vote to rehear the matter en banc." (Petition, Appendix A at A-10.)

In any event, the decision here does not conflict with the Ninth Circuit's decision in *Paige*, and is consistent with other Ninth Circuit decisions on the issue of Section 301 preemption. In *Paige*, plaintiffs claimed that they were fired because they refused to refuel generators on a construction site in a way that they believed was unnecessarily and illegally hazardous. The plaintiffs based their action for wrongful discharge on Cal-OSHA provisions providing for regulation of safety on the job. Defendants removed the action to federal court. The district court held that the plaintiffs' wrongful discharge claims were in fact claims under Section 301 and dismissed them. The Ninth Circuit reversed.

The collective bargaining agreement in *Paige* did *not* contain specific provisions governing worker safety, but merely a statement requiring the employer to comply with all state and federal health and safety laws, including OSHA. Therefore, the Ninth Circuit found that the employees' claim was not "intertwined or substantially dependent upon consideration of the terms of the labor contract." 826 F.2d at 863. The Ninth Circuit further reasoned that because the employees were concerned about the potential for a serious explosion at the jobsite, the employer's alleged conduct jeopardized the safety of others on the site, and not just the plaintiffs' safety. The employees' conduct thus implicated California's interest in protecting its citizens, rather than its interest in regulating the employment relationship. *Id.*

The Court thus compared the facts in *Paige* to the facts in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. den.*, 471 U.S. 1099 (1985). In *Garibaldi*, a truck driver subject to a collective bargaining agreement alleged that he was discharged because he refused to deliver a load of spoiled milk in violation of a state statute. As in *Paige*, the Court of Appeals concluded that a state law claim based on such conduct "pose[d] no significant threat to the collective bargaining process," and "further[ed] the state's interest in protecting the general public — an interest which transcend[ed] the employment relationship." 726 F.2d at 1375.

The facts in *Paige* and *Garibaldi* are distinguishable. In *Paige* and *Garibaldi*, the plaintiffs were not relying on rights specifically set forth in the collective bargaining agreement. In addition, the employers' conduct in *Paige* and *Garibaldi* threatened the general public, persons *beyond* the employee, and transcended the employment relationship between the companies and the plaintiffs. By contrast, Lastimosa claims that he had a right under the

CBA to wear a dust mask, and that he was wrongfully fired for insisting on this right. Contrary to the claims alleged in *Garibaldi* and *Paige*, the claim alleged by plaintiff encroaches upon the collective bargaining process because workplace safety and employee termination are expressly governed by the CBA, and Lastimosa specifically invoked those provisions.[5]

The Ninth Circuit's decision in this case is also consistent with and supported by its other decisions, particularly *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), and *De Soto v. Yellow Freight Systems, Inc.*, 811 F.2d 1333 (9th Cir. 1987). In *Olguin*, decided after *Garibaldi*, the plaintiff alleged that he was unjustly discharged in retaliation for safety complaints, in violation of federal policy set forth in mine safety statutes and general state policy. Olguin's allegations were very similar to those in Lastimosa's Complaint, except that Lastimosa did not refer to any federal policy. The Ninth Circuit held that the allegations in *Olguin* were insufficient to invoke any state policy. The Court also remarked that Olguin had already filed a complaint with the NLRB, just as Lastimosa did in this case, and with the federal mine safety agency. The Court held as follows: ". . . Olguin complained to both the NLRB and the FMHSA. He cannot *now* seek protection in state law, because he acted in behalf of no state law or policy." 740 F.2d at 1475 (emphasis

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[5] *See also Friday*, 188 Cal.App.3d at 124 (state wrongful termination claim preempted where plaintiff did not rely on a statute for the protection of the general public, but instead "complained of what he perceived to be unsafe internal practices in the handling of chemicals"); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987) (*Garibaldi* applies only when the state policy is "independent of the employment relationship"); *Oglesby v. RCA Corp.*, 752 F. 2d 272 (7th Cir. 1985)(Section 301 preempted state claim of employee who alleged wrongful discharge motivated by his safety complaints).

added). *See also Bale v. General Telephone Co. of Calif.*, 795 F.2d 775 (9th Cir. 1985)(state tort claims of bargaining unit employees preempted where employees had sought intervention of their union in regard to their termination).

The Ninth Circuit further reasoned in *Olguin* that it was "apparent that the true nature of Olguin's wrongful discharge complaint concerns the terms and conditions of employment as they are set out in the collective bargaining agreement," so that his complaint was "in fact" a Section 301 suit. 740 F.2d at 1474-75. Finally, the Ninth Circuit found that federal law preempted state law because "[t]he [collective bargaining] agreement provides the same or greater protection of job security that state tort law seeks to provide for nonunionized employees." 740 F.2d at 1474. *Cf., Schroeder v. Trans World Airlines*, 702 F.2d 189, 191 (9th Cir. 1983)(state claims preempted by Railway Labor Act where dispute concerned "topics discussed in the collective bargaining agreement").

In *De Soto*, a truck driver was terminated when he refused to drive a trailer which he mistakenly believed lacked proper registration. The Ninth Circuit held that the plaintiff's state claim for wrongful discharge was preempted by Section 301. The Court declined to follow its holding in *Garibaldi*, reasoning:

> Unquestionably, DeSoto thought he was doing the right thing in refusing to take the trailer out. Unfortunately for him, he was mistaken. He was not acting in defense of a public policy of the State of California, but incorrectly asserting his own interpretation of the law. It is just this kind of dispute over what is the appropriate management response to difficult behavior by an employee that should be the subject of a grievance procedure. It is not the kind of case that should become either a federal case or a state tort action.

811 F.2d at 1336. As the Ninth Circuit stated in *Paige*, in distinguishing *DeSoto*:

> The fact that [the plaintiff in *DeSoto*] was mistaken as to the law was central to the court's decision; no such mistaken belief is alleged here. Furthermore, health and safety concerns were not present in the case. Any potential health and safety problems from driving a truck with an unregistered trailer were negated by the fact that the trailer did indeed have the proper permits.

826 F.2d at 863 n. 11.

In the present action, the undisputed facts show that Lastimosa's fear for his health was completely unfounded and unsubstantiated. Testing by a private laboratory and Cal-OSHA itself had indicated that there was no risk to Lastimosa, and there was no evidence that Lastimosa had a medical problem related to asbestos or dust exposure. Thus, as in *DeSoto*, Lastimosa's concerns were unfounded. In any event, Lastimosa was not acting in defense of the Cal-OSHA statutes, but as he specifically testified, he was asserting his mistaken interpretation of the CBA. Lastimosa's insistence on wearing a dust mask, despite evidence that it was unnecessary and in disregard of HAC's business interests, is the type of "difficult behavior by an employee" which should be and was settled by way of the CBA's grievance procedure.

B. THE COURT OF APPEALS DID NOT ERR IN REFUSING TO IMPLY AN AMENDMENT OF LASTIMOSA'S COMPLAINT

Lastimosa also seeks review of the decision of the Ninth Circuit that the district court did not err by failing to imply an amendment of the Complaint to include a claim of

breach of the duty of fair representation by his Union, a prerequisite to suit under Section 301. Lastimosa merely argues that the Ninth Circuit erred; his argument does not raise any important questions of law, nor does Lastimosa point to any conflict between the Ninth Circuit's decision and the decision of any other court.

Lastimosa argues that "neither the Court of Appeal nor the district court, gave any justifiable reason for not allowing [Lastimosa] to proceed" on his Section 301 claim, and that both courts thus abused their discretion under Federal Rule of Civil Procedure 15(a) to deny amendments to his Complaint. (Petition at 23-24.) Lastimosa's assertions are simply untrue. The district court properly held that "[s]ince the CBA provides that the grievance and arbitration procedures are his sole remedy for breach, Lastimosa can only bring a § 301 suit against Hughes if he also makes a claim that the union breached its duty of fair representation with respect to the handling of his grievance. Since no such claim has been made against the union, an action cannot be maintained against Hughes." (Petition, Appendix A at A-19 to A-20.) *Vaca*, 386 U.S. at 184. The district court never denied Lastimosa leave to amend because he never sought such leave.

When Lastimosa argued on appeal that the district court should have *sua sponte* "implied" the required allegation into his Complaint, the Court of Appeals disagreed and affirmed the district court, reasoning that Lastimosa had not raised the issue below and that "in the district court he asserted that 'no breach of the duty of fair representation is alleged.' " (Petition, Appendix A at A-7.) Thus, each court explained its decision on this issue, and acted within its discretion under Federal Rule of Civil Procedure 15(a).

III

CONCLUSION

Respondents respectfully submit that Lastimosa has wholly failed to sustain his burden of establishing under Rule 17 of this Court's rules that there are special and important reasons why review should be granted. The decision below is not in conflict with the decisions of this Court or other decisions of the Ninth Circuit. Given the clear evidence supporting the decision below, the Petition poses no important question of federal law which should be settled by this Court. For the foregoing reasons, respondents respectfully request that Lastimosa's petition for a writ of certiorari be denied.

DATED: February 26, 1988

Respectfully submitted,

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APPENDIX A

29 U.S.C. § 185
(in pertinent part)

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158
(in pertinent part)

§ 158. Unfair labor practices

(a) It shall be an unfair practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Federal Rule of Civil Procedure 15
(in pertinent part)

(a) **Amendments**. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

APPENDIX B

Excerpts From Deposition of Catalino Lastimosa

Lastimosa: Okay. During this time when I showed my supervisor —

Respondents' Attorney: The brochures?

Lastimosa: Yeah — the document that I made copies of, *I also showed him a union contract*, on page 63, paragraph B, where it says, you know — I can't remember what it says, exactly, but I brought that to his attention.

Lastimosa's Attorney: I'll paraphrase it, if I can recall it. "If safety equipment is furnished, it must be worn."

Respondents' Attorney: Is that what you're referring to?

Lastimosa: Yes.

Respondents' Attorney:

Q. Something to that effect?

A. Yes.

Q. And you showed it to [your supervisor]?

A. Several times.

* * *

Q. Now, even after you had the meeting with your supervisor and your union and you were told you can't wear this mask any more, you insisted on wearing the mask; is that right?

A. That's correct, *according to the union contract.*

Q. And June 22nd, you were suspended because you didn't want to work without the mask; is that right?

A. That's correct.

* * *

Q. And then Mr. Carillo, I gather, suspended you that day because you would not take off the mask; is that right?

A. Yes.

Q. And what did you and he say at that time?

A. I don't understand.

Q. I take it you had a conversation with Mr. Carillo. And just relate to me what you and he said at that time, the day you were suspended.

A. He says, "I warned you about wearing the safety mask." And I said, "This is a hazardous area. *The union contract states that I am allowed to wear it, if it was given to me.*"

* * *

Q. So what was said to you in this meeting on June 28th?

A. I can't remember exactly what was said.

Q. Can you remember, in general, what was said?

A. Generally, they told me to go to work in there, without the safety mask. *And I told them* the safety mask was given to me by the safety officer, and *according to the union contract, it's mandatory that I wear it.* And I'm wearing it for my own protection. It's not affecting my job in any way.

* * *

Q. After that, you filed charges with the NLRB against the company and the union; is that right?

A. That's correct.

Q. And those were initially dismissed by the NLRB for insufficient evidence?

A. That's correct.

Q. And against the company, *your complaint was that you'd been unfairly fired and the company wasn't complying with the union contract about the safety thing*?

A. *Yes, because the union contract states that I should be able to wear the mask.*

* * *

Q. Let me just show this to you, and we'll mark this Exhibit 17. Is that a copy of the appeal you sent to the NLRB?

Lastimosa: Yes.

Respondents' Attorney:

Q. *Now, you attached a page from the union contract to this; right?* Is this what you were referring to earlier? [Referring to Article XXI of the CBA.]

A. *Yes.*

Q. And you were talking about Section A, number 1b there?

A. Yes.

Q. And your appeal was also dismissed by the NLRB; is that right?

A. That's correct.

Q. *Now when you say, in there, you were following union policy, you're talking about this specific part of the union contract that's attached?*

A. *Yes.* [Referring to Article XXI of the CBA.]